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Supreme Court of the United States

October Term, 1962

No. 432

LACY MATHEW THOMPSON
Petitioner

vs.

STATE OF NORTH CAROLINA
Respondent

BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The Opinion of the Supreme Court of North Carolina in this case is reported as STATE v. THOMPSON, 257 N. C. 452 (No. 3, Advance Sheets of North Carolina, issued 13 July 1962); S.E.2d . This Opinion also appears in the Petitioner's petition for writ of certiorari at page 7.

JURISDICTION

The Petitioner invoked the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. 1257(3).

The Respondent, State of North Carolina, denies that this Court has been presented a sufficient basis for exercise of its jurisdiction. It is believed that the record of this case will show that no substantial Federal question has been

presented, that no Federal question was properly or timely raised by the Petitioner before the trial court, and that no Federal question was expressly passed upon by the Supreme Court of North Carolina.

STATE STATUTE

The Respondent, State of North Carolina, does not concede that any substantial Federal question has been properly raised by Petitioner as to the validity of the State statute (Sec. 20-138, General Statutes of North Carolina) under which the Petitioner was convicted. We believe this Court will agree when it examines the full Record and Transcript, as well as the Opinion of the Supreme Court of North Carolina, that the State Court did not pass upon any constitutional question. However, Petitioner having been convicted under this statute, we quote it below:

> "Persons under the influence of intoxicating liquor or narcotic drugs.—It shall be unlawful and punishable, as provided in §20-179, for any person, whether licensed or not, who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this State."

CONSTITUTIONAL PROVISION

The Respondent, State of North Carolina, does not concede that any Federal question has been decided by the Supreme Court of North Carolina nor that any Federal question involving the Constitution of the United States has been properly raised by Petitioner. Since, however, Respondent will answer arguments based on Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, we quote this provision, as follows:

> "Fourteenth Amendment, Section 1
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No

state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

The Respondent, State of North Carolina, submits the following as questions raised on this petition for writ of certiorari:

1. Did the Supreme Court of North Carolina pass upon and determine any Federal question that would confer jurisdiction on this Court?

2. Has the Petitioner been deprived of any rights or privileges guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States?

STATEMENT OF CASE

Petitioner was arrested on December 17, 1960, on the misdemeanor charge of unlawfully and wilfully operating a motor vehicle on the public streets of Graham, North Carolina, while under the influence of intoxicating liquors, bitters, morphine or other opiates. On January 19, 1961, he was tried in the Municipal Recorder's Court of Graham, North Carolina, upon warrant charging this offense, found guilty and given a four-month sentence suspended upon payment of one hundred dollars ($100.00) and costs. He appealed to the Superior Court of Alamance County, North Carolina, and upon trial de novo at the January 1962 Criminal Term of Superior Court of Alamance County, was found guilty and sentenced to confinement in the County jail for a period of eighteen (18) months to be assigned to work under the supervision of the State Prison Department. From the adverse verdict of the Alamance County Superior Court, a trial court of general jurisdiction, Petitioner appealed to the North Carolina Supreme Court. The Supreme Court of North Caro-

lina found no error in an Opinion filed June 15, 1962, and reported as STATE v. LACY MATHEW THOMPSON, 257 N. C. 452, S.E.2d

FACTS IN THE CASE

The evidence of the State consisted entirely of testimony of N. E. Guy, an officer of the Graham Police Department. He testified he observed the Petitioner operating a 1949 Packard automobile on North Main and East Parker Streets in Graham in the early morning of December 17, 1960. The automobile was zigzagging from one side of the street to the other. At the time of his arrest for driving under the influence Petitioner appeared glassy eyed, talked with a thick tongue and staggered when he walked. In Officer Guy's opinion the petitioner was highly intoxicated.

Petitioner appeared as the sole defense witness. He testified that he was driving the automobile at the time he was apprehended but that he had not been drinking.

ARGUMENT

1.

NO FEDERAL QUESTION WAS PRESENTED TO OR PASSED UPON BY THE NORTH CAROLINA SUPREME COURT

The Petitioner did not raise any Federal question before the trial court or the Supreme Court of North Carolina. He attempts for the first time in this Court to present matters which he alleges deprived him of constitutional rights guaranteed by the Fourteenth Amendment of the United States Constitution.

The decision of the North Carolina Supreme Court was made entirely on a nonfederal ground. In fact there was nothing before the North Carolina Supreme Court requiring it to pass upon any Federal constitutional question.

It is essential to Federal jurisdiction that any rights, privileges or immunities claimed be set up in the State Court and denied by its decisions.

BROOKS v. MISSOURI, 124 U.S. 394, 31 L. ed 454, 8 S. Ct. 443;

HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed 722, 39 S. Ct. 336;

KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U.S. 626, 44 L. ed. 299, 20 S. Ct. 205;

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U.S. 291, 47 L. ed. 480, 23 S. Ct. 375;

PARKER v. McLAIN, 237 U.S. 469, 59 L. ed. 1051, 35 S. Ct. 632;

THOMAS v. IOWA, 209 U.S. 258, 52 L. ed. 782, 28 S. Ct. 487;

NEW YORK EX REL. COHN v. GRAVES, 300 U.S. 308, 81 L. ed. 666, 57 S. Ct. 466.

In PARKER v. McLAIN, 237 U.S. 469, 59 L. ed. 1051, 35 S. Ct. 632, on page 471, it is stated:

> "Our jurisdiction to review the judgment of the highest court of a state turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision."

Petitioner cannot raise a Federal question for the first time in his jurisdictional statement. HIAWASSEE RIVER POWER CO. v. CAROLINA-TENNESSEE POWER CO., 252 U.S. 341, 344, 64 L. ed. 601, 40 S. Ct. 330; THOMAS v. IOWA, 209 U.S. 258, 52 L. ed. 782, 28 S. Ct. 487.

2.

THE SUPREME COURT OF NORTH CAROLINA DECIDED THIS CASE ON A NONFEDERAL GROUND AND THERE IS NO FEDERAL QUESTION FOR REVIEW BY THIS COURT.

Aside from Petitioner's failure to properly invoke the jurisdiction of this Court through a timely assertion of a right, privilege or immunity guaranteed by the Fourteenth Amendment to the United States Constitution, he has failed to raise any substantial Federal question. Both the questions presented by the Petitioner in his petition for writ of certiorari and the justification advanced for the issuance of the writ involve nonfederal matters. Even so, questions 2 and 3, as the record before this Court will reveal, were not presented to the North Carolina Supreme Court. They are raised for the first time in this Court.

As we have already pointed out, this Court will give consideration only to those questions that have been adjudicated by the State Court. In WHITLEY v. CALIFORNIA, 274 U.S. 357, 71 L. ed. 1095, 47 S. Ct. 641, Mr. Justice Brandeis explained the reviewing power of this Court in his concurring opinion, as follows:

> "Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied (Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Montana ex rel. Haire v. Rice, 204 U.S. 291, 301, 51 L. ed. 490, 495, 27 Sup. Ct. Rep. 281); but to the particular claims duly made below, and denied (Seaboard Air Line R. Co. v. Duval, 225 U. S. 477, 485-488, 56 L. ed. 1171, 1175, 1176, 32 Sup. Ct. Rep. 790). We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases with errors, although the objection was not taken in the trial court. Wiborg v. United States, 163 U.S. 632, 658-660, 41 L. ed. 289, 298, 299, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U.S. 207, 221, 222, 49 L. ed. 726, 731, 732, 25 Sup. Ct. Rep. 429. This is a writ of error to a state court. Because we may not inquire into the errors now alleged, I concur in affirming the judgment of the state court."

In YAKUS v. UNITED STATES, 321 U.S. 414, 88 L. ed. 834, 64 S. Ct. 660, in speaking of the timely assertion of alleged constitutional rights, this Court said:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in

criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil v. Vermont, 144 U.S. 323, 331, 36 L. ed. 450, 455, 12 S. Ct. 693; Barbour v. Georgia, 249 U.S. 454, 460, 63 L. ed. 704, 707, 39 S. Ct. 316; Whitney v. California, 274 U.S. 357, 360, 362, 380, 71 L. ed. 1095, 1099, 1100, 1107, 47 S. Ct. 641. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in which it was properly taken. Seaboard Air Line R. Co. v. Watson, 287 U.S. 86, 77 L. ed. 180, 53 S. Ct. 32, 86 ALR 174. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in Whitney v. California, supra (274 U.S. 380, 71 L. ed. 1107, 47 S. Ct. 641), and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare Woolsey v. Best, 299 U.S. 1, 81 L. ed. 3, 57 S. Ct. 2, with Ex parte Siebold, 100 U.S. 371, 25 L. ed. 717."

We will not burden this brief with further discussion of this question but we do refer the Court to certain cases which sustain our position that the State Court must be given an opportunity to pass upon alleged constitutional questions before this Court will charge it with any errors in regard to such matters.

See:

UNITED STATES v. SPECTOR, 343 U.S. 169, 96 L. ed. 863, 72 S. Ct. 591;

SPIES v. ILLINOIS, 123 U.S. 131, 31 L. ed. 80, 8 Ct. 21;

BROOKS v. MISSOURI, 124 U.S. 394, 31 L. ed. 454, 8 S. Ct. 443;

BALDWIN v. KANSAS, 129 U.S. 52, 32 L. ed. 640, 9 S. Ct. 193;

MORRISON v. WATSON, 154 U.S. 111, 38 L. ed. 927, 14 S. Ct. 995;

ERIE R. CO. v. PURDIE, 185 U.S. 148, 46 L. ed 847, 22 S. Ct. 605;

LAYTON v. MISSOURI, 187 U.S. 356, 47 L. ed. 214, 23 S. Ct. 137;

LOUISVILLE & N. R. CO. v. WOODFORD, 234 U.S. 46, 58 L. ed. 1202, 34 S. Ct. 739;

WILSON v. COOK, 327 U.S. 474, 90 L. ed. 793, 66 S. Ct. 663;

WILLIAMS v. GEORGIA, 349 U.S. 375, 99 L. ed. 1161, 75 S. Ct. 814;

PARKER v. ILLINOIS, 333 U.S. 571, 92 L. ed. 886, 68 S. Ct. 708;

PENNSYLVANIA R. CO. v. ILLINOIS BRICK CO., 297 U.S. 447, 462, 463, 80 L. ed. 769, 56 S. Ct. 556;

BAILEY v. ANDERSON, 326 203, 90 L. ed. 3, 66 S. Ct. 66.

Even the most cursory perusal of the evidence discloses that there is no factual basis for Petitioner's contention that his conviction was so totally devoid of evidentiary support as to raise a due process issue. Petitioner made no motion for nonsuit in the trial court and under State practice is deemed to have conceded its sufficiency to sustain the charge. STATE v. GASTON, 236 N.C. 499, 73 S.E. 2d 311; STATE v. JACKSON, 226 N.C. 760, 40 S.E. 2d 417. While he did question as prejudicial an instruction of the Court which permitted the jury to find that he was under the influence of an intoxicating beverage, the North Carolina Supreme Court found there was sufficient evidence to support the challenged instruction.

We contend that GRUNDLER v. STATE OF NORTH CAROLINA, 283 F. 2d 798 (1960), is in point and that the following language from the opinion in that case, at p. 801, should apply to the instant case:

"The appellants also maintain that the evidence furnished an insufficient basis for conviction. . . . They argue that this case is governed by Thompson v. City of Louisville, 1960, 362 U.S. 199, 206, 80 S. Ct. 624, 629, 4 L. Ed. 2d 654, where the Supreme Court held it a denial of due process for a state to convict someone upon no evidence of guilt. The Court said:

> 'Thus we find no evidence whatever in the record to support these convictions. Just as "Conviction upon a charge not made would be a sheer denial of due process," so is it a violation of due process to convict and punish a man without evidence of his guilt.'

"We think that the transcript of the trial demonstrates that the evidence was sufficient. Even if we entertained doubts about this, there would be no basis for a federal court in a habeas corpus proceeding to undertake a broad review of the conviction in the state court. There is a difference between a conviction based upon evidence deemed insufficient as a matter of state criminal law, and one so totally devoid of evidentiary support as to raise a due process issue. It is only in the latter situation that there has been a violation of the Fourteenth Amendment, affording the state prisoner a remedy in a federal court on a writ of habeas corpus.

"Certainly, in this case, there was substantial evidence against the petitioners. . . . The evidence against the appellants was obviously not so slight as to raise a constitutional issue, and Thompson v. City of Louisville, supra, is not applicable."

Even if the North Carolina Supreme Court or the North Carolina trial court made errors in State law, which is denied, no Federal constitutional question would be presented.

The point raised by the Petitioner in this case was decided by the Court in BUCHALTER v. NEW YORK, 319 U.S. 427, 87 L. ed. 1492, 63 S. Ct. 1129, where this Court said on this point, the following:

"The petitioners insist that the rulings upon evidence and instructions to the jury when taken in their totality,

indicate that whatever the intention of the trial judge, his rulings and attitude precluded a fair consideration of the case. The Court of Appeals held that certain of the challenged rulings and instructions were erroneous but that the errors were not substantial in the sense that they affected the ability of the jury to render an impartial verdict, and that others of the alleged errors were not such under the law of New York. As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law. We cannot say that they were such as to deprive the petitioners of a trial according to the accepted course of legal proceedings."

In AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639, 47 S. Ct. 353, it is said at p. 273:

> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

Errors of a State Court in interpreting and applying the laws of that state furnish no basis for the claim that there has been a denial of due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution. The Constitution of the United States does not guarantee that the decisions of State Courts shall be free from error or require that their pronouncements shall be consistent.

DAVIS v. TEXAS, 139 U.S. 651, 35 L. ed. 300, 11 S. Ct. 675;

HOWARD v. KENTUCKY, 200 U.S. 164, 50 L. ed. 421, 26 S. Ct. 189;

WORCHESTER COUNTY TRUST CO. v. RILEY, 302 U.S. 292, 82 L. ed 268, 58 S. Ct. 185;

MILLER v. TEXAS, 153 U.S. 535, 38 L. ed. 812, 14 S. Ct. 874;

CARTER v. ILLINOIS, 329 U.S. 173, 91 L. ed. 172, 67 S. Ct. 216.

When a State Court judicially determines that there is sufficient evidence of a fact to be submitted to a jury, its decision is not reviewable by the United States Supreme Court on writ of certiorari.

NOBLE v. MITCHELL, 164 U.S. 367, 41 L. ed. 472, 17 S. Ct. 110;

AMERICAN RAILWAY EXP. CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639, 47 S. Ct. 353;

BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U.S. 30, 84 L. ed. 563, 60 S. Ct. 411.

In BELL TELEPHONE CO. v. PENNSYLVINA PUBLIC UTILITY COMMISSION, 309 U.S. 30, 32, 84 L. ed. 563, 60 S. Ct. 411, it is stated in a *per curiam* opinion:

> "As to the first contention, it appears that the State court heard the appeal judicially and decided that there was evidence justifying the finding of the Commission of unreasonable discrimination in the transaction of its intrastate business. In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

The following paragraph from the opinion of Justice White in NOBLE v. MITCHELL, 164 U.S. 367, 373, 41 L. ed. 472, 17 S. Ct. 110, would seem to be decisive of the question:

> "It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which

is not subject to review here on writ of error. DOWER v. RICHARDS, 151 U.S. 659 (38:306); RE BUCHANAN, 158 U.S. 31 (39:884)."

It it should be determined that the Supreme Court of North Carolina erroneously decided the case, no question would be presented for determination by this Court for it has long been held that where a party is fully heard in the regular course of judicial proceedings, an erroneous decision of the State Court is not a denial of due process within the Fourteenth Amendment of the Constitution of the United Sates.

BONNER v. GORMAN, 213 U.S. 86, 53 L. ed. 709, 29 S. Ct. 483;

AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639, 47 S. Ct. 353;

WEST OHIO GAS CO. v. PUBLIC UTILITIES COMMISSION, 294 U.S. 63, 79 L. ed. 761, 55 S. Ct. 316.

CONCLUSION

The Respondent, State of North Carolina, believes that it has shown the Court that on the Record of this case that no Federal question exists, that no Federal question was raised below in the State Court and that no Federal question was expressly passed upon by the Supreme Court of North Carolina, and, therefore, this Court does not have jurisdiction.

Respondent asks this Court to refuse to grant writ of certiorari.

Respectfully submitted,

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